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Proposed Lead Counsel

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

I.B.L. INVESTMENTS LTD.,  
Individually and On Behalf of All Others  
Similarly Situated,

Plaintiff,

v.

TERAYON COMMUNICATION  
SYSTEMS, INC., ZAKI RAKIB, JERRY  
D. CHASE, MARK A. RICHMAN and  
EDWARD LOPEZ,

Defendants.

No. 3:06-cv-03936-MJJ

**NOTICE OF MOTION AND MOTION  
OF I.B.L. INVESTMENTS LTD. FOR  
APPOINTMENT AS LEAD  
PLAINTIFF AND APPROVAL OF  
LEAD PLAINTIFF'S SELECTION  
OF LEAD COUNSEL;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: October 24, 2006  
Time: 9:30 a.m.  
Ctmm: 11

**NOTICE OF MOTION**

**TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE, that on October 24, 2006, at 9:30 a.m. or as soon  
thereafter as the matter can be heard, in the courtroom of the Honorable Martin J. Jenkins,  
situated at 450 Golden Gate Avenue, 19<sup>th</sup> Floor, San Francisco, California 94102, Movant  
I.B.L. Investments Ltd. ("I.B.L. Investments" or "Movant") will move, and hereby does  
move, under §§21(D) *et seq.* of the Securities Exchange Act of 1934 as amended by the  
Private Securities Litigation Reform Act of 1995 ("PSLRA"), for an order (a) appointing

1 I.B.L. Investments as Lead Plaintiff, and (b) approving its selection of Glancy Binkow &  
2 Goldberg LLP as Lead Counsel for the Class.

3 Movant seeks appointment as Lead Plaintiff and approval of Lead Plaintiff's  
4 choice of counsel pursuant to the Securities Exchange Act of 1934, the Federal Rules of  
5 Civil Procedure and the PSLRA. This motion is based on this Notice, the attached  
6 memorandum of points and authorities, the declaration of Lionel Z. Glancy, and the  
7 Court's complete files and records in this action, as well as such further argument as the  
8 Court may allow at the hearing on this motion.

9 A copy of this Notice has been sent to all parties on the attached proof of service.

### 10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 Movant respectfully submits this memorandum of points and authorities in support  
12 of its motion for appointment as Lead Plaintiff and approval of Lead Plaintiff's selection  
13 of Lead Counsel.

#### 14 **I. FACTUAL BACKGROUND<sup>1</sup>**

15 This is a securities fraud class action on behalf of public investors who purchased  
16 the common stock of Terayon Communication Systems, Inc. ("Terayon" or the  
17 "Company") between October 28, 2004 and March 1, 2006, both dates inclusive (the  
18 "Class Period"), seeking to pursue remedies under the Securities Exchange Act of 1934  
19 (the "Exchange Act"). Named as individual defendants are Zaki Rakib, Jerry D. Chase,  
20 Mark A. Richman and Edward Lopez.

21 Defendant Terayon, a Delaware corporation, develops, markets and sells  
22 equipment to broadband service providers for delivering broadband voice, digital video  
23 solutions, and data services to residential and business subscribers in the United States.  
24 The Company maintains its principal executive offices at 4988 Great America Parkway,  
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27 <sup>1</sup> Summary of facts taken from the Class Action Complaint for Violations of Federal  
28 Securities Laws, *I.B.L. Investments Ltd., et al. v. Terayon Communication Systems, Inc., et al.*,  
No. 06-cv-03936-MJJ (filed June 23, 2006).

1 Santa Clara, California 95054.

2 Throughout the Class Period, defendants' representations concerning the  
3 Company's financial condition, impressive income growth, and various other statements  
4 in the Company's quarterly and annual financial results and SEC filings were materially  
5 false and misleading because defendants knew or recklessly disregarded that the  
6 Company's reported financial results and growth were attributable to improper  
7 accounting practices, including improper revenue recognition practices, which resulted in  
8 an overstatement of the Company's revenues. Unbeknownst to investors, the Company's  
9 internal controls and procedures and, as a result, the Company's projections and reported  
10 financial results, were seriously flawed. Furthermore, the Company's earnings were not  
11 increasing in the amounts that had been represented by defendants, and the Company's  
12 reported earnings statements for the interim periods were in violation of Generally  
13 Accepted Accounting Principles (GAAP).

14 On November 7, 2005, after the market closed, Terayon announced that the  
15 Company "is reviewing the recognition of revenue for certain transactions during prior  
16 periods." More specifically, an internal review was initiated after the Company  
17 determined "that certain revenues recognized in the second half of fiscal year 2004 from a  
18 customer may have been recorded in incorrect periods."

19 On March 1, 2006, Terayon issued a press release announcing that the Company's  
20 "consolidated financial statements for the year ended December 31, 2004 and for the four  
21 quarters of 2004 and the first two quarters of 2005 should no longer be relied upon and  
22 will be restated." In response to these revelations, the next day, March 2, 2006, Terayon's  
23 stock price fell \$0.37 per share – a more than 13% decline in the stock's value – on  
24 extremely heavy trading volume of more than four million shares.

## 25 **II. PROCEDURAL HISTORY**

26 Plaintiff I.B.L. Investments commenced the above-captioned action on June 23,  
27 2006, and on July 11, 2006, counsel for plaintiff published a notice of the pendency of  
28

1 plaintiff's case in *Financial Times*, a widely circulated national business-oriented  
 2 publication. See Declaration of Lionel Z. Glancy In Support of Motion of I.B.L.  
 3 Investments For Appointment As Lead Plaintiff and For Approval of Lead Plaintiff's  
 4 Selection of Lead Counsel (the "Glancy Declaration") at Exhibit A.

5 Movant brings the instant motion pursuant to its complaint and notice of pendency,  
 6 and files this motion prior to expiration of the 60-day period from publication of the July  
 7 11, 2006 notice.

### 8 **III. ARGUMENT**

#### 9 **A. Movant Should Be Appointed Lead Plaintiff**

10 Section 21D(a)(3)(B) of the PSLRA provides the procedure for selecting Lead  
 11 Plaintiff in class actions brought under the Act. The PSLRA directs courts to consider  
 12 any motion to serve as Lead Plaintiff filed by class members in response to a published  
 13 notice of class action by the later of (i) 60 days after the date of publication of the notice;  
 14 or (ii) as soon as practicable after the Court decides any pending motion to consolidate.  
 15 15 U.S.C. §78u-4(a)(3)(B). The PSLRA provides a "rebuttable presumption" that the  
 16 most "adequate plaintiff" to serve as Lead Plaintiff is the person or group of persons that:

17 (aa) has either filed the complaint or made a motion in response to a notice. . . ;

18 (bb) in the determination of the Court, has the largest financial interest in the  
 19 relief sought by the class; and

20 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil  
 21 Procedure.

22 15 U.S.C. §78u-4(a)(3)(B)(iii). See also *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 584  
 23 (N.D. Cal. 1999).

24 As set forth below, Movant satisfies all three of these criteria and thus is entitled to  
 25 the presumption that it is the most adequate Lead Plaintiff for the Class.

#### 26 **1. Movant Filed The Complaint**

27 On June 23, 2006, counsel for plaintiff in the above-captioned action filed the  
 28

1 instant complaint, and on July 11, 2006, published a notice of pendency of plaintiff's case  
2 pursuant to §21D(a)(3)(A)(I) of the PSLRA, announcing that a securities class action had  
3 been filed against defendants herein, and advising purchasers of Terayon securities that  
4 they had until September 11, 2006, to file a motion to be appointed as Lead Plaintiff.  
5 Glancy Declaration, Exhibit A. Movant files the instant motion pursuant to its complaint  
6 and published notice, and submits herewith its sworn certification attesting that it is  
7 willing to serve as representative of the Class and is willing to provide testimony at  
8 deposition and trial, if necessary. *See* Glancy Declaration, Exhibit B. Movant has already  
9 demonstrated a high level of interest in this litigation by filing the Complaint in the  
10 instant action and communicating with counsel regarding the status and facts of the case.  
11 Movant therefore satisfies the requirement of either filing a complaint or making a motion  
12 in response to a published notice.

## 13 2. Movant Has The Largest Financial Interest In This Action

14 The PSLRA requires a court to adopt the rebuttable presumption that "the most  
15 adequate plaintiff . . . is the person or group of persons that . . . has the largest financial  
16 interest in the relief sought by the class." 15 U.S.C. §78u-4(a)(3)(B)(iii); *Naiditch v.*  
17 *Applied Micro Circuits*, 2001 WL 1659115 (S.D. Cal. 2001). Moreover, courts have  
18 recognized that "one goal of the PSLRA is to have the plaintiff class, represented by a  
19 member with a substantial financial interest in the recovery as incentive, monitor the  
20 litigation to prevent its being "lawyer-driven." *In re Enron Corp. Securities Litigation* 206  
21 F.R.D. 427, 438 (S.D. Tex. 2002).

22 Here, Movant purchased 28,600 shares of Terayon during the Class Period and has  
23 suffered losses of \$6,558.00. *See* Glancy Declaration, Exhibit C. To the best of its  
24 knowledge, Movant believes that it has the largest known financial interest in this case of  
25 any movant, and thus satisfies the largest financial interest requirement to be appointed as  
26 Lead Plaintiff for the Class.  
27  
28

1                   **3.     Movant Satisfies The Requirements Of Rule 23**  
2                   **Of The Federal Rules Of Civil Procedure**

3                   Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to  
4                   possessing the largest financial interest in the outcome of the litigation, a Lead Plaintiff  
5                   must “otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil  
6                   Procedure.” Rule 23(a) provides that a party may serve as a class representative if the  
7                   following four requirements are satisfied:

8                             (1) the class is so numerous that joinder of all members is  
9                             impracticable, (2) there are questions of law or fact common to  
10                            the class, (3) the claims or defenses of the representative parties  
11                            are typical of the claims or defenses of the class, and (4) the  
12                            representative parties will fairly and adequately protect the  
13                            interest of the class.

14                   Fed. R. Civ. P. 23(a).

15                   In making its determination that a Lead Plaintiff satisfies the requirements of Rule  
16                   23, the Court need not raise its inquiry to the level required in ruling on a motion for class  
17                   certification. A *prima facie* showing that a PSLRA movant satisfies the requirements of  
18                   Rule 23 is sufficient. *Greebel v. FTP Software*, 939 F. Supp. 57, 60, 64 (D. Mass. 1996).  
19                   Courts thus limit their inquiry to the typicality and adequacy prongs of Rule 23(a), and  
20                   defer examination of the remaining requirements until class certification. *Enron*, 206  
21                   F.R.D. at 441; *In re Waste Management*, 128 F. Supp. 2d at 411; *In re Oxford Health*  
22                   *Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998) (“[t]ypicality and adequacy of  
23                   representation are the only provisions relevant to a determination of lead plaintiff under  
24                   the PSLRA.”)(citing *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997) and  
25                   *Fischler v. Amsouth Bancorporation*, 176 F.R.D. 583 (M.D. Fla 1997)); *In re Olsten*  
26                   *Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 296 (E.D.N.Y. 1998).

27                   **a.     Movant’s Claims Are Typical**

28                   The Rule 23(a) typicality requirement is satisfied when a plaintiff’s claims arise  
from the same event, practice or course of conduct that gives rise to other class members’  
claims and plaintiff’s claims are based on the same legal theory. *See Enron*, 206 F.R.D. at

441; *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479-80 (5<sup>th</sup> Cir. 2001). Rule 23 does not require the Lead Plaintiff to be identically situated with all class members. It is enough that the Lead Plaintiff's situation shares a common issue of law or fact. *See Berger*, 257 F.3d at 480. Here, Movant's claims are typical of the claims asserted by the Class. Movant, like all members of the Class, alleges that defendants violated the Exchange Act by publicly disseminating a series of false and misleading statements concerning Terayon's financial performance. Movant, like all of the members of the Class, purchased Terayon securities during the Class Period at prices artificially inflated by defendants' misrepresentations and omissions, and was damaged thereby. The interests of Movant are closely aligned with other Class members' and they are, therefore, typical of the other members of the Class.

**b. Movant Is An Adequate Representative**

The adequacy of representation requirement of Rule 23 is satisfied where it is established that a representative party "will fairly and adequately protect the interests in the class." Accordingly:

The Ninth Circuit has held that representation is "adequate" when counsel for the class is qualified and competent, the representative's interests are not antagonistic to the interests of absent class members, and it unlikely that the action is collusive.

*Takeda*, 67 F. Supp. 2d at 1133 (citing *In re Northern Dist of Cal., Daikon Shield IUD Prod. Lab. Litig.*, 693 F.2d 847, 855 (9<sup>th</sup> Cir. 1982)). The class representative must also have "sufficient interest in the outcome of the case to ensure vigorous advocacy." *Takeda*, 67 F. Supp. 2d at 1137 (citing *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. III 1986). Movant has demonstrated its adequacy as Lead Plaintiff by evincing a strong desire to prosecute this action on behalf of the Class, and has shown that it is " 'willing' and 'able' to 'take an active role in and control the litigation and to protect the interests of absentees.' " *Berger*, 257 F.3d at 479.



1 Movant herein has communicated with counsel concerning this case and has made  
 2 this motion to be appointed Lead Plaintiff. Movant also has sustained significant losses  
 3 from its investments in Terayon securities and is, therefore, extremely motivated to  
 4 pursue the claims in this action. *See* Glancy Declaration, Exhibit C.

#### 5 **4. Movant Is Presumptively The Most Adequate Lead Plaintiff**

6 The presumption in favor of appointing Movant as Lead Plaintiff may be rebutted  
 7 only upon proof “by a purported member of the Plaintiffs’ class” that the presumptively  
 8 most adequate plaintiff:

9 (aa) will not fairly and adequately protect the interest of the class; or

10 (bb) is subject to unique defenses that render such plaintiff incapable of  
 11 adequately representing the class.

12 15 U.S.C. § 78 u-4(a)(3)(b)(iii)(I).

13 The presumption that I.B.L. Investments is the most adequate Lead Plaintiff is not,  
 14 therefore, subject to rebuttal. Movant has suffered substantial losses and believes that it  
 15 has the largest known financial interest in this case of any movant. The ability of Movant  
 16 to fairly and adequately represent the Class is discussed above. Movant is not aware of  
 17 any unique defenses defendants could raise against I.B.L. Investments that would render  
 18 it inadequate to represent the Class. Accordingly, I.B.L. Investments is presumptively  
 19 the most-adequate Lead Plaintiff and should be appointed Lead Plaintiff for the Class.

#### 20 **B. The Court Should Approve Lead Plaintiff’s Choice of Counsel**

21 The PSLRA vests authority in the Lead Plaintiff to select and retain counsel,  
 22 subject only to approval of the Court. *See* §21D(a)(3)(B)(v) of the Exchange Act. Thus,  
 23 the Court should not disturb the Lead Plaintiff’s choice of counsel unless “necessary to  
 24 protect the interest of the plaintiff class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa); *see also*  
 25 *In re Cavanaugh* 306 F.3d 726, 733 (9<sup>th</sup> Cir. 2002). In the present case, Movant has  
 26 retained Glancy Binkow & Goldberg LLP to pursue this litigation on its behalf, and will  
 27 retain this firm as Plaintiff’s Lead Counsel, in the event it is appointed Lead Plaintiff.  
 28 Glancy Binkow & Goldberg LLP possesses extensive experience in the area of securities



1 litigation and has successfully prosecuted numerous securities fraud class actions on  
2 behalf of injured investors, as reflected by the firm resumé attached to the Glancy  
3 Declaration as Exhibit D. Thus, the Court may be assured that, by granting Movant's  
4 motion, the Class will receive the highest caliber of legal representation.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Movant respectfully asks the Court to grant its motion  
7 and enter an Order (a) appointing I.B.L. Investments as Lead Plaintiff, and (b) approving  
8 its choice of Glancy Binkow & Goldberg LLP as Lead Counsel for the Class, and  
9 granting such other relief as the Court may deem just and proper.

10  
11 Dated: September 11, 2006

Respectfully submitted,

12  
13 **GLANCY BINKOW & GOLDBERG LLP**

14 By: s/Lionel Z. Glancy  
15 Lionel Z. Glancy

16 1801 Avenue of the Stars, Suite 311  
17 Los Angeles, California 90067  
18 Telephone: (310) 201-9150  
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20 *Attorneys for Movant and*  
21 *Proposed Lead Counsel*  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE BY ELECTRONIC POSTING  
PURSUANT TO NORTHERN DISTRICT OF CALIFORNIA LOCAL RULES AND  
ECF GENERAL ORDER NO. 45  
AND BY MAIL ON ALL KNOWN NON-REGISTERED PARTIES**

I, the undersigned, say:

I am a citizen of the United States and am employed in the office of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action. My business address is 1801 Avenue of the Stars, Suite 311, Los Angeles, California 90067.

On June 27, 2006, I served the following by posting such documents electronically to the ECF website of the United States District Court for the Northern District of California:

- 1     **NOTICE OF MOTION AND MOTION OF I.B.L. INVESTMENTS LTD. FOR  
APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD PLAINTIFF'S  
SELECTION OF LEAD COUNSEL; MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**
- 2     **DECLARATION OF LIONEL Z. GLANCY IN SUPPORT OF MOTION OF I.B.L.  
INVESTMENTS LTD. FOR APPOINTMENT AS LEAD PLAINTIFF AND  
APPROVAL OF LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL**
- 3     **[PROPOSED] ORDER GRANTING MOTION OF I.B.L. INVESTMENTS LTD. FOR  
APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD PLAINTIFF'S  
SELECTION OF LEAD COUNSEL**

on all ECF-registered parties in the action and, upon all others not so-registered but instead listed below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California. They are:

Terayon Communication Systems, Inc.  
4988 Great America Parkway  
Santa Clara, CA 95054

Jerry D. Chase  
c/o Terayon Communication Systems, Inc.  
4988 Great America Parkway  
Santa Clara, CA 95054

Zaki Rakib  
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Mark A. Richman  
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Santa Clara, CA 95054

Edward Lopez  
c/o Terayon Communication Systems, Inc.  
4988 Great America Parkway  
Santa Clara, CA 95054

Executed on D, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

*S/Kyaa D. Heller*  
Kyaa D. Heller